

STATE OF INDIANA) IN THE VIGO CIRCUIT COURT
) SS:
COUNTY OF VIGO) CAUSE NO: 84C01-1210-MI-9007

IN THE MATTER OF THE)
MOVE OVER LAKE CONSERVANCY DISTRICT)

) Natural Resources Commission
) Administrative Cause
) Number: 12-206C

**RECOMMENDED REPORT OF THE NATURAL RESOURCES COMMISSION
WITH RESPECT TO THE PETITION FOR THE ESTABLISHMENT
OF THE MOVE OVER LAKE CONSERVANCY DISTRICT**

I. PETITION, SUMMARY OF EVIDENCE RECEIVED AT PUBLIC HEARING

A. Petition

On December 6, 2012, David R. Bolk, Judge, Vigo Circuit Court, entered an order referring the Petition for the Establishment of the Move Over Lake Conservancy District (the “Petition”) to the Natural Resources Commission (the “Commission”), which in substantive part, states as follows:

ENTRY ORDERING THE PETITION REFERRED TO THE NATURAL RESOURCES COMMISSION

...

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED by this Court as follows:

1. The notice of filing, pendency, docketing, and hearing on the Petition by publication and proofs thereof, and the same hereby are, in all things approved by the Court.
2. The Petition to Establish the Move Over Lake Conservancy District bears the necessary number of signatures of freeholders owning land within the proposed conservancy district, and complies with the statutory requirements as to form and content as set forth in IC 14-33-1 and particularly in IC 14-33-2-4, and that said Petition be, and the same hereby is, in such respects approved by this Court.
3. The Clerk of this Court shall forthwith forward to the Natural Resources Commission a certified copy of the Petition....
4. The Natural Resources Commission shall make a determination in respect to said Petition in accordance with IC 14-33-2-17, inclusive.
5. The Natural Resources Commission shall file a report in this Court in accordance with IC 14-33-2-22 as soon as practicable but in any case within one hundred twenty (120) days of the date of this Entry.

The Commission received a copy of the Petition on December 10, 2012.

A conservancy district may be established for any purpose set forth in Ind. Code §14-33-1-1(a).

The Petition lists the purposes for which the conservancy district is proposed as (1) developing

forests, wildlife areas, parks, and recreational facilities if feasible in connection with beneficial water management; and (2) operation, maintenance, and improvement of works of improvement including, but not limited to Move Over Lake and the Move Over Lake dam and spillway.

As a consequence of the Court's referral, the Commission circulated letters to state and local governments for comment on December 17, 2012.

Under the Vigo Circuit Court Order and Ind. Code § 14-33-2-19, a public hearing was held as scheduled on January 11, 2013, in the Vigo County Government Annex, 121 Oak Street, Council Room, Terre Haute, Indiana. A notice of the public hearing was published on December 21, 2012 in the *Tribune Star*, a newspaper of general circulation in Vigo County.

B. Summary of Evidence Received at Public Hearing

Jennifer M. Kane was appointed as the Commission's hearing officer. Kane opened the public hearing as scheduled on January 11, 2013 to receive comment on the proposed Move over Lake Conservancy District. She outlined the statutory responsibilities of the Commission regarding the review of the Petition. Approximately 15 persons attended.

The Hearing Officer called upon the Petitioners' attorney, Alan M. Hux, to present evidence in support of the Petition.

Petitioners Supporting Evidence

Attorney Hux introduced the following exhibits for the Petitioners:

EXHIBIT

- A** Petition for the Establishment of the Move Over Lake Conservancy District (Vigo Circuit Court, Cause No. 84C01-1210-MI-9007)
- B** Move Over Lake Conservancy Project, Vigo Beacon Assessed Property Value Spreadsheet (Prepared by Kendra Cohen-Cook), January 9, 2013
- C** Move Over Lake Dam Preliminary Inspection Report (prepared by Triad Associates, Inc.), August 28, 2011
- D** Move Over Lake Dam Phase 1 Construction, Field Reports, Record Drawing (prepared by Triad Associates, Inc.), November 18, 2011
- E** Move Over Lake Dam Phase 2 – Construction (prepared by Triad Associates and LandTech)
- F** Move Over Lake Plan and Section Outfall Structure (Prepared by Triad Associates, Inc.), November 2011
- G** Emergency Overflow Structure, Move Over Lake Dam, Vigo County, IN; IDNR Dam #84-51 (Prepared by Triad Engineering, INC.), December 2012

- H** Move Over Lake Dam Phase 2, Preliminary Construction & Engineering Budget 2013
(Prepared by Triad Engineering, INC.)
- I** Move Over Lake Dam Conservancy Annual O & M Budget 2013
- J** Move Over Lake Conservancy Project – Dam Breach Loss of Lake Market Value
Spreadsheet (Prepared by Jim Twiggs), January 4, 2013

Hux then introduced Jim Twiggs, Andrew Faust, Thomas Schubert, Kendra Cohen-Cook, and Dean Doti to testify in favor of the Petition. Their testimony is summarized¹ as follows:

James E. Twiggs resides at Move Over Lake and owns two properties within the proposed Move Over Conservancy District. Twiggs noted that the residents of Move Over Lake have a homeowner's association, but was unaware of whether the Move Over Lake Homeowner's Association (the "Association") filed for incorporation with the Indiana Secretary of State.² He said the Association has bylaws, which were drafted in the 1940s by the original owners of Move Over Lake. Twiggs serves as the Association's Secretary, and has been working to solve the issues of Move Over Lake and its dam since 2004. Twiggs said there are 15 freeholders within the proposed conservancy district. He stated that he has been involved in the process to establish the proposed conservancy district, and noted that eight freeholder signatures were filed with the Vigo Circuit Court, but has obtained two additional freeholder signatures.

Twiggs said it is planned that the proposed Move Over Lake Conservancy District would obtain ownership of the Move Over Lake common area, ownership or leasehold interest in the dam, and ownership of the dam spillway in order to make repairs. He explained the Department of Natural Resources (the "DNR") in 2003 and 2004 inspected the Move Over Lake dam and spillway, and it found the structures to be "deficient in its maintenance, and requested that the owners of the dam perform maintenance and keep it to certain State codes and standards.... Since that time the [Association] has attempted to basically repair and maintain that dam to those standards. We found resistance in being able to completely and totally: (1) collect funds; and (2) repair the dam due to some of the property owners not wishing to have portions of the dam repaired."

Twiggs said the portion of the dam located on and owned by the Fausts has been repaired as of 2011 "to a certain degree. The remaining portion of the dam still requires repair and maintenance to make it comply with State standards. The precipitation of all this really came about after the June 2008 flood where we nearly lost the dam and spillway. Basically, Andy Faust started this project as one of the owners of the dam in the summer of 2009 knowing that the dam needed to be repaired and brought up to State codes so that we wouldn't lose it maybe in a potential future flood event." Twiggs said all Move Over Lake homeowners have been notified of the ultimate dam breach and loss of property values if the dam and spillway are not repaired to State standards. Twiggs said the proposed conservancy district is necessary. He stated, "I don't believe there is any other way to do it other than this. We have tried several other ways. I do believe this is the right way and the correct way" to repair the dam and spillway.

¹ Statements made at the January 11, 2013 public hearing that are identified with quotation marks are intended to set off direct quotations. The audio quality of the recording was not always pristine. As a result, the statements should be considered as summaries and not as verbatim.

² A Move Over Lake Homeowner's Association was not found during a search of the Secretary of State's Business Division database at https://secure.in.gov/sos/online_corps/name_search.aspx.

Twiggs said the engineering firm, Triad Associates, Inc., was contracted to provide engineering services for the repair and maintenance of the dam and spillway. Twiggs believes the proposed conservancy district holds promise of economic and engineering feasibility. He said short-term financing would be obtained from a Vigo County financial institution to complete the lake and dam improvements. Once the repairs are completed the plan is to assess an exceptional benefit tax against the freeholders within the proposed district to cover the capital costs of the project. Twiggs said the cost for the repairs to the dam and spillway is approximately \$300,000. With 15 freeholders, the assessment would be approximately \$20,000 per freehold within the proposed conservancy district.

Twiggs stated he prepared Petitioners' Exhibit B, a listing of all the properties within the proposed conservancy district project. He said the assessed property values reflect the values as shown on the Vigo County Beacon website as of December 12, 2012, with a total assessed value of \$1,998,500. Twiggs estimated a 50% decrease in property value to the homeowners if the Move Over Lake dam was breached. "So, the loss would be just under \$1 million in property value if the dam was breached and the lake was drained." Twiggs explained that his valuations were based on appraisals on his two properties and other information received in 2010. He believed that each freehold would experience a loss of value in excess of \$20,000.

Twiggs said the proposed conservancy district would seek long-term financing through a bond issue or other method available to the proposed conservancy district to finance the capital costs for assessments not paid in full by freeholders. The long-term financing would be paid over the life of the bond issue.

Twiggs said the Association has been annually assessing homeowners for lake and dam maintenance in the amount of \$1,500 per homeowner. The annual assessment was reasonable, but he anticipated the annual fee would increase due to engineering costs and dam inspections. Twiggs explained the Association fees mainly covered costs to maintain water quality by treating for weeds and algae. "I would expect that to go up slightly due to the fact that we have not done much maintenance or repair on the dam itself and the State requirements adding to the [costs] of lake and water treatment." Assessments would be ongoing to cover the maintenance costs for the lake, dam, and spillways and to improve the drainage. He said the benefits of the purposes of the proposed district exceed the costs.

Twiggs said all properties within the proposed conservancy district are contiguous, and the district would cover and serve a proper area. The properties to be included in the proposed district are those "touching or adjacent to the main [Move Over] Lake, and those freeholds offer that access to the Move Over Lake." He said the proposed conservancy district would also be compatible with other area water management projects.

Andrew K. Faust, a resident and freeholder within the proposed conservancy district, said he signed the Petition and was in support of the formation of the proposed conservancy district. Faust stated the proposed district was necessary, and he stated he was familiar with land values of the Move Over Lake area. "I spoke to my real estate attorney about this when we were trying to form an association before, and [the attorney] was estimating that it would be about half of the

value if the dam were breached or if something were to happen to the dam.” Faust said the devaluation of his property would be in excess of \$20,000 with the loss of the lake. He said the proposed conservancy district seems to offer benefits in excess of costs.

Faust said he is one of the owners of the dam and has been involved in the process to repair the dam and spillway. He was not able to continue to be solely financially responsible for the needed repairs, and he said he “would not like it, but he would have to consider” breaching the dam due to financial concerns. Faust explained he would convey his ownership of the dam to the proposed conservancy district. He said the proposed conservancy district holds promise of economic and engineering feasibility and would cover and serve a proper area as proposed.

Thomas M. Schubert stated that he was employed with Triad Associates, Inc., an engineering firm located in Indianapolis, Indiana. Schubert holds a Bachelor’s of Science Degree and a Master’s of Science in Civil Engineering from Purdue University. Schubert is a registered Professional Engineer in the State of Indiana. Schubert indicated that Triad Associates, Inc. has been contracted by the Association to provide engineering services in relation to the Move Over Lake dam and spillway repairs.

Schubert said he has reviewed and inspected the Move Over Lake area, the lake, dam and spillway. He prepared Petitioners’ Exhibit C, the Move Over Lake Dam Preliminary Engineering Inspection Report dated August 28, 2011 (the “Preliminary Engineering Inspection Report”). The Preliminary Engineering Inspection Report is based on a site visit made in August 2011, as well as the inspection reports from the Department of Natural Resources (the “DNR”). Schubert recommended that the repairs of the dam and spillway be completed in phases. He noted that Phase 1 construction and repair have been completed. Repairs to the existing principal spillway and the clearing of the portion of the dam face, upstream and downstream, located on the Faust property have been completed. He said the cost for completion of Phase 1 was \$92,987.30.

Schubert explained that Petitioners’ Exhibit D, Move Over Lake Dam Phase 1 Construction Field Reports, Record Drawing, dated November 18, 2011 (the “Phase 1 Construction Report”), includes the field inspection reports made while onsite during the repairs to the principal spillway and clearing of area at the dam face and clearing the downstream channel. The exhibit also includes photographs of the work and a record drawing of the outfall or spillway structure, which was prepared based on the repairs made. Schubert identified Petitioners’ Exhibit F as an enlarged copy of the record drawing attached to Petitioners’ Exhibit D. Included on the Exhibit F are photographs to facilitate a viewer’s orientation as to the approach to the principal spillway and the discharge.

Schubert said additional repairs are needed on the dam and appurtenant structures. “There is still probably a little over two-thirds of the dam that still needs to be cleared of...vegetation and trees on the lakeside, or upstream face, and the downstream face.” Fill along the toe slope needs to be placed on the remaining two-thirds “so it can be maintained correctly”. He said Petitioners’ Exhibit E (the “Phase 2 Construction”) provides a narrative of the remaining repairs. “We also included in the exhibit the work that was not completed under Phase 1. We have taken that over to Phase 2.”

Schubert identified Petitioners' Exhibit G as the schematic for the emergency or principal spillway that is required to bring the Move Over Lake dam into compliance with State standards "so that we don't top the dam again, which happened in 2008." The exhibit includes a schematic of the approach to the principal spillway and schematics of additional channel work required downstream.

Schubert stated the proposed conservancy district is necessary for the purposes stated in the Petition. Based on his experience, investigation, and study conducted of the Move Over Lake dam and spillway, he believed the proposed conservancy district holds promise of economic and engineering feasibility. He identified Petitioners' Exhibit H as the preliminary construction and engineering cost estimate for Phase 2 construction, which is estimated to be \$219,220. Schubert said Phase 1 construction costs were approximately \$92,000, and he believed Phase 2 costs were reasonable for inclusion in the overall projects for the proposed conservancy district.

Schubert indicated he agreed with the testimony of Twiggs that there would be an economic loss to homeowners of approximately \$1 million in property value with the loss of Move Over Lake. Based on the total project cost of \$310,000, the proposed conservancy district seems to offer benefits in excess of its costs.

Schubert identified Petitioners' Exhibit I as the estimated total annual operation and maintenance budget for the proposed Move Over Lake Conservancy District of \$24,500. Based on 15 freeholders, each freeholder would be assessed \$1,600 annually for the operation and maintenance of the lake, dam, and associated structures. He believed the proposed conservancy district proposes to cover and serve a proper area and could be established and operated in a manner compatible with other water management projects.

Kendra Cohen-Cook stated she is an Indiana licensed real estate agent employed with Gibson Real Estate, and represents buyers and sellers in the residential real estate market. She was familiar with the Move Over Lake residential development and was aware of the issues surrounding the Move Over Lake dam and spillway. Cohen-Cook reviewed the assessed values of Move Over Lake residents, and identified Petitioners' Exhibit J as an accurate list of assessed values of the Move Over Lake residential properties. When asked regarding the impact on the property values if the Move Over Lake dam were breached, she stated property values would decrease by 45%. When comparing the loss of property value with the total cost estimate of the construction, repair, and maintenance of the Move Over Lake dam and spillway, the proposed conservancy district seems to offer benefits in excess of costs. She stated that the proposed conservancy district is necessary in order to repair the dam and its appurtenances in order to preserve the Move Over Lake.

Comment Received in Support of the Proposed Conservancy District

Dean Doti stated he was President of the Association but did not own property within the proposed conservancy district. He provided comments on behalf of his parents, Jim and Donna Doti, freeholders within the proposed conservancy district. Doti said his parents are elderly and he manages the property for them. "I see benefits of the conservancy district to help share the

costs of the repairs. In the past, we assessed dues and only part of the people would pay the dues, and the rest of us that would pay then would have to make up the difference. I think [the proposed conservancy district is] a big benefit. During the flood, our property did get flooded, and we had repairs there to make. I think the emergency spillway that Tom [Schubert] is talking about would help eliminate that, if not do great good to prevent that from happening. The third issue is the runoff from the nearby farm fields. Nutrients going into the lake, I think, increase the costs of maintenance in order to have good, clean water, and if there was some sort of filtering area". He concluded, "The only way to get to that point on all three of those is to form a conservancy district to help us improve the whole surroundings for everyone involved."

Comments Received in Opposition to the Proposed Conservancy District

Roy Woodsmall stated that he has resided within two miles of Move Over Lake "since the lake was put in. I'm just a landowner over there. I don't have a house. I don't want one over there, don't need one." Woodsmall owns a tract of land in the proposed conservancy district in which a portion of the dam is located. "I have been here longer than anybody. I don't own a home. We own land."

Sally Harrison said Roy and Deloris Woodsmall are her grandparents, and she resides "across the street" from the Woodsmall's property. "I grew up across the street from the property they own on the lake." She said she was "presented with this idea of fixing the dam. The engineer has been out. He came out with Ron Carter to meet with us, and they gave us the ideas of what needed to be done, but we got a little worried when they started talking about a conservancy district. We put thousands and thousands of dollars in the dam, which we own two sections. We were very concerned that if we go ahead and do all the work then they would form a conservancy district. It's not really fair. We don't want to lose our property anyway. We have offered to do the work multiple times on our own property. We don't want a donation from anybody else. We just want to do the work. Everyone talks about the 'loss of this lake, the loss of this lake'. If the dam did breach, wouldn't we not put it back and have a lake? I mean, I don't know why we wouldn't do that. It's very hard for me to understand why it would just disappear, and we would not fix it. It is also hard for me to also understand that they complain about the chemicals in the fields, but they're dumping \$20,000 worth of chemicals in [the lake] yearly to take care of the duckweed.... I think we need to do things more environmentally friendly also.... The amount of trees we are taking off the dam, I wouldn't be in control of that. It's my property. I know the trees that need to come off, and I'm fine with that". Harrison added, "We know what needs to be done, we just want to be able to move forward and get it done. If they want an association, that's great, something that helps the lake, that's fantastic. I'm sure that people would gladly pay into that if they agree with what's being done. I think that has always been the issue." She said Move Over Lake is a rural community and she resides there full-time. "Being the actual owner of the dam, I don't want to see the property to go into a conservancy district, and I don't want the [dam] to ever breach.... I don't want the lake gone. Of course, we want it there. I will do anything to keep it there". Harrison concluded, "First, we have a conservancy district, and then what do we do, you bring in city water, then the roads are going to be paved. I just don't know where it ends. If you have people willing to do the work that own the property, I think that should be their option."

Harrison also submitted written comments (Remonstrants' Exhibit 17) on behalf of herself, Sherry Lamb, Richard Harrison, Beth D'Amico, Dennis Dunham (interested party), and Roy and Delores Woodsmall.

Sherry Lamb, a freeholder within the proposed district, stated "I've grown up there all my life, and it's just sad to see that people that don't live there all the time are trying to form this conservancy, which... I feel like that if they would just leave the homeowners alone and let them do the work that needs to be done and have a little guidance. We are not asking everybody to pitch in like Andy [Faust] did. He wasn't able to take care of his part so he had everybody on the lake to pay for it... [William Harrison] is planning, and he has offered multiple times to take care of all the work, because in the winter time it is his down time. I feel like if everybody had gotten together and agreed upon something that it would have been a lot easier than coming to this... We are a rural community, and everyone out there has always been neighborly and friendly, but not anymore. If we are going to pay millions and millions of dollars to have something done, which they have already done, and it's not being taken care of, and it's going to grow back up.... They already spent \$92,000."

Lamb submitted photographs of the Move Over Lake development. The Petitioners' attorney objected to the photographs admission on the grounds of improper foundation.³

Beth D'Amico, a freeholder and homeowner within the proposed conservancy district, stated that residents of the Move Over Lake community have met several times regarding the proposed conservancy district. D'Amico stated that she lives on the lake full-time. "I have five children..., and my home is valued at \$270,000". She added, "If we do this conservancy and it goes through, it's based on home values. If somebody's home is valued at \$49,000 versus \$270,000, I mean, I think if we could do something or come to something that's a little bit more fair across the board...if that's even possible. ... It's just very frustrating to me, because we do live on the lake full-time. I don't want the [dam] to be breached or for it to overflow. My kids are out there every day.... My husband is out there fishing almost every day as well. We don't want that lake breached or flooded or anything either, but I think this conservancy is just almost overboard. If they are willing to do the work according the IDNR, thank you. We already gave [Andrew Faust] tons of money to do his part.... If they are willing to do it, I don't understand why we have to do a conservancy." D'Amico concluded, "We bought that house because of where it's at. It's in the country. It's not in the city.... We don't want anything to happen to [the lake], but we can come to something.... I think there are other ways we can go about this."

³ Ind. Code § 4-21.5 (commonly known as "AOPA") does not apply to the Commission's role prior to formation of a conservancy district (Natural Resources Commission, Information Bulletin #36 (7th Amendment), Section II.A(6), 20110928-IR-312110566NRA)). The photographs were accepted into the record as Remonstrants' Exhibits 1 through 16 on the sole basis the photographs depict the Move Over Lake area as it appeared on January 7, 2013, the date the photographs were taken.

Petitioners Rebuttal

In response to Sherri Lamb’s comment regarding funds spent, Attorney Hux stated the evidence did not support her claim the Petitioners “spent millions and millions of dollars”. He noted that the testimony from the engineer, Thomas Schubert, indicated that the remaining capital costs for the project is approximately \$212,000, and for Phase 1 approximately \$92,000 was expended. Counsel Hux then recalled James Twiggs.

James Twiggs explained that the process to repair the Move Over Lake dam and spillway was initiated in the summer of 2004 precipitated by receipt of the DNR’s initial inspection report, which indicated needed repair. Since 2004 there have been “multiple attempts to work with” the owners of the dam—Woodsmalls, Harrisons, and Fausts—to complete the required repairs. Twiggs noted that “everything escalated after the flood of June 2008...and the damage and near loss of the dam that occurred.” In the spring of 2012, a meeting was held “where we decided we would offer the [owners of the dam] a contract, lease agreement, or some method by which they would be exempt from the fees associated with this conservancy district in exchange for their repair and replacement or fixing of the dam to bring it up to code. Those efforts have not borne fruit. It began with a verbal offer and then it became a written offer. We extended a legal agreement to them in the fall of 2012. Right now, we are waiting on a final set of plans from the [engineering firm], but at this point based on multiple offers extensions since the April–May timeframe, we are no closer to reaching an agreement to solving the issues of the dam and the project moving forward on the Harrison–Woodsmall section of the dam. We still intend to make that happen. We want to make that happen, and it’s our goal to get that in place, but the dialogue has been very slow.”

II. GOVERNMENTAL COMMENTS: COUNTY AND STATE

Vigo County, Board of Commissioners

On January 9, 2013, Michael J. Wright, Attorney for Vigo County, submitted the following letter:



Michael R. Pence
Governor
William C. VanNess II, MD
State Health Commissioner

January 16, 2013

Jennifer M. Kane
Paralegal
NRC
Division of Hearings
100 N. Senate Avenue, Room N501
Indianapolis, IN 46204-2200

FILED

JAN 23 2013

NATURAL RESOURCES COMMISSION
DIVISION OF HEARINGS

Re: Establishment of Move Over
Lake Conservancy District
Environmental Review
Vigo County

Dear Ms. Kane:

In regards to the above referenced project, I am responding to the environmental review documents received by our office.

Based on information available to this office, we have no reservation about the proposed project and foresee no significant environmental health related hazards.

If you should have any further questions regarding this matter, please feel free to contact me.

Sincerely,

Michael Mettler, REHS, Director
Environmental Public Health Division
317/233-7183
mmettler@isdh.in.gov

cc: Vigo County Health Department

2 North Meridian Street • Indianapolis, IN 46204
317.233.1325 tdd 317.233.5577
www.statehealth.in.gov

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Indiana State Department of Health

On January 23, 2013, Michael Mettler, REHS, Director, Environmental Public Health Division, submitted the following letter:



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500 Ohio Street
P.O. Box 9849
Terre Haute, Indiana
47807-3517
Phone: 812.232.3388
Fax: 812.232.8817
www.wslfirm.com

Richard J. Shagley
rshagley@wslfirm.com

Bradley A. Bough
bbough@wslfirm.com

Richard J. Shagley II
richards@wslfirm.com

Thomas S. Clary II
tclary@wslfirm.com

Michael J. Wright
mwright@wslfirm.com

Derek W. Comer
dcomer@wslfirm.com

Robert L. Wright
of Counsel

Norman L. Lowery
of Counsel

*Registered Civil Mediator
**Also Licensed in Illinois

January 8, 2013

FILED

JAN 09 2013

NATURAL RESOURCES COMMISSION
DIVISION OF HEARINGS

Jennifer M. Kane
Natural Resources Commission
Division of Hearings
100 North Senate Avenue, Room N501
Indianapolis, IN 46204-2200

RE: Establishment of the Move Over Lake Conservancy District
Your File: 12-206C

Dear Ms. Kane:

My name is Michael J. Wright and I am writing this letter in my capacity as attorney for Vigo County. I am in receipt of your letter to Mike Ciolli dated December 17, 2012 regarding the Petition for Establishment of the Move Over Lake Conservancy District, said matter having been filed in the Vigo Circuit Court under Cause Number 84C01-1210-MI-9007. The purpose of my letter is to advise you that Vigo County *does not* wish to comment.

If you have any questions or concerns, please do not hesitate to call me.

Sincerely yours,

WRIGHT, SHAGLEY & LOWERY, P.C.

Michael J. Wright

MJW/sab

Enclosure (1)

cc: Vigo County Commissioners

Indiana Department of Natural Resources

On February 7, 2013, Michael W. Neyer, Director of the Department of Natural Resources, Division of Water, submitted the following:



Division of Water Memorandum

Date: February 7, 2013

To: Jennifer Kane, Paralegal
Division of Hearings, Natural Resources Commission

From: Michael W. Neyer, P.E.
Director, Division of Water

RE: Establishment of the Move Over Lake Conservancy District

On October 24, 2012, the petition for the establishment of the Move Over Lake Conservancy District was filed in Vigo Circuit Court. Under Cause Number 84C01-1210-MI-9007, this petition was deemed complete as to form and content and referred to the Natural Resources Commission on December 6, 2012. The petition was forwarded to the Division of Water for review and comment.

The proposed Move Over Lake Conservancy District is located on the Lewis Quadrangle Map, Section 29 of Township 11 North, Range 8 West. Documents on file with the Division of Water indicate that this significant hazard dam was constructed in the early 1950's and a permit for construction from the Department of Natural Resources (DNR) was not obtained. According to DNR records, the Move Over Lake Dam (State Dam Identification No. 84-51) is 20 feet in height and nearly 500 feet long. No construction plans are available and it has been reported that fill for this dam was brought to the site from nearby coal strip mines. Beginning in 2004 and continuing into 2007 and 2010, DNR inspection reports indicate that the dam is in poor condition. The inspection reports noted problems such as too steep of slopes, erosion on the discharge side of the principal spillway, and no emergency spillway. Additionally dense trees and extensive brush made a proper inspection of the dam not possible.

Move Over Lake Dam is a private dam situated on three (3) different landowner's property; Woodsmall, Lamb/Harrison, and Faust. Over the last decade the dam has experienced damage and overtopped on multiple occasions. The engineering services of Triad Associates, Inc. were obtained and a contractor was hired in 2011 to perform emergency maintenance activities on one-third (Faust property) of the dam. However, on the other portions of the dam, little if any work has been initiated on the known deficiencies.

According to IC 14-33-2-2, the petition to create a conservancy district must be signed by 30 % of the freeholders owning land in the proposed district. The proposed Move Over Lake Conservancy District includes 15 freeholders with 9 of those signing the petition. This petition requests that the district be established for the purposes of: 1) developing forests, wildlife areas, parks, and recreational facilities if feasible in connection with beneficial water management, and 2) operation, maintenance, and improvement of works of improvement.

As directed by Chapter 2, Section 17 of the Indiana Conservancy Act (IC 14-33), and pursuant to the Public Hearing on January 11, 2013, concerning the proposed establishment of the Move Over Lake Conservancy District in Vigo County, the Division of Water offers the following comments.

1) Appears to be necessary**a. Developing forests, wildlife areas, parks, and recreational facilities if feasible in connection with beneficial water management:**

The Move Over Lake Dam was built in the early 1950's as a recreational impoundment. Currently a Homeowners' Association (HOA) exists for Move Over Lake but membership is voluntary and not all owners contribute monetarily. The annual dues are \$1500 per property and primarily used for weed control but funds have been used for repairs to the dam and nuisance animal control. Some of the owners have had to pay additional funds to make up the difference for those who do not contribute.

Many of the residents utilize the lake for year round fishing. The quality of the fishing is maintained by not allowing public access and a strict catch and release policy for particular fish species which is in addition to State regulations. Nearly 90 percent of the residents have one (1) or more boats including pontoon boats, bass boats, jon boats, kayaks, and canoes. In the past the HOA installed and operated a large diffuser aeration system to increase the water quality and eliminate annual lake turn over and resulting fish kill.

Most of the families that own property around Move Over Lake utilize the recreational benefits. Beth D'Amico indicated at the January 11, 2013 public hearing that her husband and five (5) children frequently enjoy fishing and playing in the lake.

Any work performed to rehabilitate and maintain the dam will assure the proposed freeholders continued enjoyment of the recreational opportunities at Move Over Lake. This purpose appears necessary.

b. Operation, maintenance and improvement of a work of improvement for water based recreational purposes:

Appropriate maintenance is an integral part of responsible dam ownership. Currently ownership of the dam and spillway is shared by three (3) property owners: Woodsmall, Lamb/Harrison, and Faust. This dam was constructed in the early 1950's and it does not appear that any permits were obtained or plans prepared. There is a HOA but not all owners pay the annual dues which are used for repair and maintenance of the dam and spillway along with weed control.

In 2004, the DNR Inspection Report noted that the dam was deficient in many areas. Specifically mature trees were located on the dam, there was no grass cover, and dumped brush and limbs were located on the downstream slope. Erosion was also noted on the principal spillway. In 2007 and 2010, the inspection reports noted the same problems with more specificity. The crest of the dam had several puddles and ruts while the upstream slope appeared too steep. Seepage was located at the toe and cracks in the concrete were found in the spillway structure. Clearly this significant hazard dam continues to have deficiencies in portions of the dam that have not been addressed since they were first noted in 2004.

Information provided to the Division of Water indicates that the HOA notified the owners of the dam in 2004 and 2005 of the deficiencies described in DNR's inspection report and their liability for the condition of the dam. Additionally in 2006 and 2007 efforts were made by other residents and the HOA to address the continuing issues on the dam. It was mentioned during the public hearing that

this dam experienced problems in 2008 when the crest of the dam was over topped after a heavy rainfall event.

In 2009 activities to begin a project on the dam were starting to formulate. The HOA contracted with Triad Associates, Inc. for engineering services; they performed an inspection in 2010 and made recommendations on the needed repairs. It was not until 2011 that a maintenance project was initiated on the portion of the dam that is owned by Andy Faust. This was considered Phase 1 of a multi-phase plan to rehabilitate the Move Over Lake Dam proposed by Triad. Phase 1 of the project cost approximately \$93,000. Phase 2 is estimated to cost \$219,220 and would address deficiencies on the portions of the dam owned by Woodsmall and Lamb/Harrison.

On May 12, 2012, the HOA sponsored an informational meeting for all property owners around Move Over Lake. The presentation explained the purpose of a conservancy district, outlined a course of action, and gave an overview of potential boundaries. At the meeting it was noted that until a conservancy district is established and the ownership of the dam is turned over to that entity, the current owners would need to assume the risk of loss should it fail or be compromised. The owners of two (2) portions of the dam (Woodsmall and Lamb/Harrison) communicated that they were willing to complete the required repairs at their own expense in order to avoid the creation, involvement, and fees associated with the creation of a conservancy district.

Roy and Delores Woodsmall indicated at the January 11, 2013 public hearing that they own land at Move Over Lake which includes a one-third (1/3) portion of the dam but they do not live there. The other one-third of the dam is owned by the Woodsmall's daughter (Sherry Lamb) and granddaughter (Sally Harrison). The family stated that they have offered many times to take care of the problems on the dam themselves and Ms. Harrison's husband is a contractor who has equipment available.

These owners (Woodsmall and Lamb/Harrison) stated that they realize that maintenance activities need to be addressed but have never agreed with the direction of the HOA for a variety of reasons. Sherry Lamb expressed concern over the division between neighbors and doesn't believe that a conservancy district is necessary. Sally Harrison whose family has owned property at Move Over Lake for many years is concerned that part-time residents are telling the full-time residents what they need to do. Additionally they have financial concerns about the creation of a conservancy district and are worried about how big and restrictive this entity could become.

Maintenance work on a portion of the dam was completed in 2011. Though the owners of the remaining two-thirds (2/3) of the dam indicated multiple times that they are willing to address problems with the dam, no progress in that direction has been made since 2004 when the deficiencies were noted. DNR inspection reports from 2007 and 2010 still rate the condition of the dam as poor. Mr. Tom Schubert, P.E. from Triad Associates conducted an inspection of the Move Over Lake Dam on April 5, 2010 and noted the same inadequacies as the DNR.

Placing the ownership and maintenance responsibilities into the hands of one entity instead of three (3) property owners would appear to be beneficial to all freeholders at Move Over Lake. However there is dissention among owners. The formation of the Move Over Lake Conservancy District for the purpose of operation, maintenance and improvement of a work of improvement appears to be necessary.

2) Holds promise of economic and engineering feasibility

Testifying at the public hearing was Mr. Jim Twiggs who is a property owner, full-time resident, as well as secretary of the Move Over Lake Association. Mr. Twiggs has researched the property values

and assessments of the 15 freeholders around the lake and the assessed value is nearly \$2 million. He indicated that there is approximately \$300,000 in total expenses to make repairs to the dam which would be \$20,000 per freehold. The loss of property value without the dam and lake would be nearly \$1 million. Mr. Twiggs further noted at the public hearing that in his opinion he believes the loss in value would be greater than the \$20,000 each freeholder needs to contribute towards rehabilitation of the dam. Although Mr. Twiggs did not indicate he is an appraiser, there is the likelihood that the loss of property value would have an unequal impact; property with a residence will realize a greater loss than vacant land.

As indicated by Mr. Twiggs, the HOA assesses each property owner \$1500 annually to pay for maintenance of the lake and dam. In the past these funds have been used for items such as weed control, fish stocking, an aeration system, and nuisance animal control. Unfortunately not all property owners pay the voluntary assessments. Dean Doti, president of the association indicated that some of the owners have had to contribute additional funds to cover the difference needed to cover their obligations. Apparently the severity of the issues with the dam became more evident because in 2011 many of the homeowners stepped up and contributed several thousand dollars each for the Phase 1 of the repairs to the dam.

The 2004, 2007, and 2010 DNR Dam Safety Inspection Reports indicate that the overall status of the dam was conditionally poor. These reports noted that mature trees were growing on the upstream slope and no grass cover existed. Additionally the slopes appeared too steep while dumped limbs and brush were located downstream of the structure. Major erosion was noted at the principal spillway and seepage was found at the toe. There were ruts on the crest of the dam and the spillway structure had cracks in the concrete.

Documentation and testimony presented at the public hearing indicates that the Move Over Lake Association contacted Triad Associates, Inc. for engineering consultation on the maintenance and repair of the dam. Mr. Tom Schubert, P.E. performed a site inspection of the Move Over Lake Dam on April 5, 2010 and prepared a written Preliminary Engineering Inspection Report. This report indicates the earth filled dam is 20 feet in height, 25 feet wide, and 500 feet in length. Bunch Road, is a private stone road that crosses the top of the dam. The principal spillway consists of a 6 feet by 10 feet poured in-place concrete box and there is no emergency spillway. It was noted that the top of the dam is less than 5 feet above the crest of the spillway weir. The slope on the upstream side of the dam is 2:1 and covered with trees and brush. Conditions on the downstream slope are much the same as the upstream side. Severe erosion was found on the discharge side of the principal spillway.

Phase 1 of the work to address deficiencies on the dam was initiated on the Faust property in October 2011. These emergency tasks included the tree fall removal and principal spillway restoration which were imperative to prevent a breach and resulting dam failure. This work was completed in November 2011 at a cost of approximately \$93,000. The majority of the Move Over Lake property owners contributed \$7700 to the HOA in order to pay for Phase 1.

Triad Associates prepared a preliminary scope of work and cost estimates for Phase 2 which would be performed on the Woodsmall and Lamb/Harrison properties. This Phase would include items such as clearing on the upstream and downstream faces of the dam, adding fill to the downstream side so that the slope is maintainable, hard armoring the upstream face with rip-rap, and filling any low spots or ruts on the top of the dam. Since the completion of Phase 1 further engineering analysis has shown that the necessary emergency spillway would need to be larger than first anticipated. According to Triad Associates, the items included in Phase 2 along with the additional engineering and hydraulic analysis has an estimated cost of \$219,220.

The lack of access to the Woodsmall and Lamb/Harrison portions of the dam along with financial constraints has stalled the progress of Phase 2. It was noted at the public hearing that the HOA offered multiple times (verbally and in writing) to lease the Woodsmall and Lamb/Harrison properties and perhaps exempt them from any fees so that the Phase 2 repairs could be accomplished. However according to testimony provided at the public hearing, the HOA is no closer to resolving the issues on those portions of the dam.

The question does arise as to how the conservancy district, if established, will gain access or ownership to the portions of the dam owned by Woodsmall and Lamb/Harrison if they are unwilling at this point to lease the property to the HOA. Mr. Faust indicated at the public hearing that he would turn over ownership of his portion of the dam to the conservancy district at no cost. However the other owners made no such statement with regard to ownership. In order for the repair and continued maintenance of the dam at Move Over Lake to be successful, one entity needs to be the responsible party through ownership or long term lease.

It is anticipated that the creation of a conservancy district for maintenance, repair, and operation of the works of improvement will have a positive effect on property values while continuing to provide recreational opportunities to the freeholders of the proposed District. Additionally all freeholders will pay their fair share as opposed to a voluntary HOA where some residents do not contribute but receive the same benefits as those who do pay the assessments. The petition indicates that costs will most likely be paid for by the annual levy of special benefits taxes and an annual assessment on land to be exceptionally benefited. Annual operation and maintenance costs are estimated to be \$24,500.

The Move Over Lake Conservancy District will need to establish a Cumulative Maintenance Fund as set forth in the Indiana Conservancy Act, IC 14-33-14.

It appears that the proposed Move Over Lake Conservancy District holds promise of economic and engineering feasibility but hurdles continue to exist between the HOA and the owners of the Woodsmall and Lamb/Harrison parcels.

3) Seems to offer benefits in excess of costs

The Move Over Lake Dam is owned by three (3) property owners: Woodsmall, Lamb/Harrison, and Faust. In 2004, the DNR Dam Inspection Report indicated that this significant hazard dam had many deficiencies and in 2008 the dam was overtopped after a significant rainfall event. Triad Associates conducted an inspection in April 2010 and prepared their Preliminary Engineering Inspection Report in August 2011. Phase 1 of the repairs was completed on the Faust portion in November 2011 however work has not been initiated on the Woodsmall and Lamb/Harrison parcels.

Kendra Cohen-Cook is employed by Gibson Real Estate and provided testimony at the January 11, 2013 public hearing. Ms. Cohen-Cook indicated that she was familiar with Move Over Lake and had visited the area. She had looked at the current home values and there would certainly be a loss of value without the dam and lake. Ms. Cohen-Cook said that a 45% decrease could be expected.

Andy Faust, a property owner but not a year round resident, believes that the property value everyone would lose if the lake and dam were gone would be nearly 50%. Mr. Faust is a partial owner of the dam and cannot afford to do all of the repairs by himself. He also indicated that he was willing to convey ownership of his portion of the dam to the conservancy district at no cost.

Currently the property owners around Move Over Lake are assessed \$1500 annually by the HOA. Testimony at the public hearing indicated that the annual operation and maintenance costs for the proposed conservancy district would be approximately \$24,500 or \$1633 per freeholder. Since HOA would most likely cease to exist if the conservancy district is established, each freeholder would pay nearly the same amount to the conservancy district for O&M as they did for HOA fees. Additionally all freeholders would pay the assessment not just those who voluntary do so.

The proposed District will collect and manage funds to address repairs to the Move Over Lake Dam and provide for long-term maintenance to the recreational facilities. It would seem to be in the best interest of the partial owners of the dam (Woodsmall and Lamb/Harrison) to lease or convey ownership of their portions to a conservancy district. By doing so the costs of any repair or maintenance to the structure would be borne by all freeholders who benefit and not just Woodsmall and Lamb/Harrison families.

The benefits should exceed the costs associated with rehabilitating this dam. This will maintain the recreational opportunities to the freeholders of the District while maintaining property values associated with the lake.

4) Proposes to cover and serve a proper area

Chapter 3 of the Indiana Conservancy Act states that "any area may be established as a district if each part of the district is contiguous to another part". The boundaries of the proposed Move Over Lake Conservancy District are contiguous.

The proposed boundaries encompass the area around Move Over Lake located in Section 29, of Township 11 North, and Range 8 West. The conservancy district will include only those fifteen (15) property owners whose property touch the main lake and will benefit from the establishment of the District.

As proposed the Move Over Lake Conservancy District boundaries appear to cover and serve a proper area.

- 5) Could be established and operated in a manner compatible with established Conservancy Districts, flood control projects, reservoirs, lakes, drains, levees, and other water management or water supply projects.

The Move Over Lake Conservancy District is located in Vigo County as are other conservancy districts. However no other districts are in close proximity and the other district's boundaries would not overlap those of the proposed Move Over Lake Conservancy District. The proposed Move Over Lake Conservancy District could be established and operated in a manner compatible with other districts. The proposed district does not appear to interfere with any other known flood control or water management areas.

II. FINDINGS

For the two stated purposes in the Petition, Ind. Code § 14-33-2-17 directs the Commission to make determinations and report to the Vigo Circuit Court:

- (1) Whether the proposed district appears to be necessary;
- (2) Whether the proposed district holds promise of economic and engineering feasibility;
- (3) Whether the proposed district seems to offer benefits in excess of costs and damages;
- (4) Whether the proposed district proposes to cover and serve a proper area; and
- (5) Whether the proposed district could be established and operated in a manner compatible with established: (A) conservancy districts; (B) flood control projects; (C) reservoirs; (D) lakes; (E) drains; (F) levees; and (G) other water management or water supply projects.

Within this statutory structure, the following findings are recommended to the Vigo Circuit Court with respect to the Petition for the creation of the Move Over Lake Conservancy District:

PURPOSE: Developing forests, wildlife areas, parks, and recreational facilities if feasible in connection with beneficial water management

The proposed district appears to be necessary

Move Over Lake and dam are located in an unincorporated area of Vigo County, Indiana, and located on the USGS Lewis Quadrangle map, Section 29, Township 11 North, Range 8 West, Honey Creek Township. The Move Over Lake dam was constructed without a permit during the early 1950s and is located within the Move Over Lake residential community. Currently, the residential community is managed by the Move Over Lake Association (the “Association”). Evidence presented indicates that Move Over Lake is used for recreation, such as fishing and boating.

The Move Over Lake dam (State ID #84-51) is 20 feet high with a crest length of 500 feet and crest width of 28 feet. The Department of Natural Resources (the “DNR”) currently rates the dam as a significant hazard dam. A significant hazard dam is a structure the failure of which may cause damage to isolated homes and highways, or cause the temporary interruption of public utility services.⁴

Under Ind. Code §14-27-7.5-12, the Department may conduct a controlled breach and eliminate any unsafe dam if proper maintenance and necessary improvements are not carried out. A breach and elimination of the Move Over Lake dam would result in the loss of the Move Over Lake and the recreational opportunities it provides. If established, the Move Over Lake Conservancy District would manage and maintain the Move Over Lake, dam, spillways, and recreational areas. This approach would help protect the integrity of the water management infrastructure.

⁴ Indiana Dam Safety Inspection Manual, 2007, §1.6; p. 9 (<http://www.in.gov/dnr/water/3593.htm>).

Testimony was presented indicating the Association has difficulty collecting dues from its members to cover maintenance and repair costs.⁵ Some homeowners are not satisfied with the current maintenance of the Move Over Lake and its water quality.⁶ Association members are not in agreement regarding the recommended repair and maintenance of the Move Over Lake dam and its appurtenances.⁷ The Association does not have a reliable funding mechanism or expertise required to properly manage and maintain the Move Over Lake dam and its appurtenances for developing forests, wildlife areas, parks and recreational facilities in connection with beneficial water management. The proposed district appears to be necessary.

Whether the proposed district holds promise of economic and engineering feasibility

The proposed Move Over Lake Conservancy District would benefit 15 freeholders within the proposed district and the surrounding community by appropriate dam maintenance. Evidence indicated the dam was constructed during the 1950s using spoil⁸ from nearby coal mining operations. As dams age, they tend to lose their strength through material deterioration, making them more susceptible to dam failure.⁹ Evidence indicates the dam was overtopped in 2008 after a heavy rainfall event.

In general, a...significant or low hazard dam should safely pass 50% of the probable maximum precipitation (PMP) storm event. A PMP storm is a very large event, typically resulting in accumulated rainfall of 25 inches or more in small watersheds in Indiana.

Indiana Dam Safety Inspection Manual, 2007, §1.6, p. 9.

In early November 2011, Triad Associates inspected the Move Over Lake dam, found the dam and existing spillway to be deficient, and recommended repairs be completed in phases. The total estimated costs to repair the dam and to bring the dam into regulatory compliance is \$312,207.30. Testimony presented indicated that the loss of Move Over Lake would have an economic impact in the approximate range of \$800,000¹⁰ to \$1,039,220¹¹.

Currently, annual Association dues are \$1,500; however, some homeowners do not contribute making it necessary for others to contribute additional funds to cover costs.¹² Funds collected are primarily used to cover costs of chemical treatment of Move Over Lake to control weeds and algae. In order to maintain and keep the Move Over Lake dam and spillways in compliance with State standards, Triad Associates recommended the following annual operating and management budget:

⁵ *Testimony of Twiggs*, p.3, of this report.

⁶ *Testimony of Sally Harrison*, p. 8 of this report.

⁷ *Testimonies of Sally Harrison* (p. 7, 8), *Lamb* (p. 8), and *Twiggs* (p. 9), of this report; Remonstrants' Exhibit 17, p. 3.

⁸ "Spoil" is defined as overburden that has been removed during a surface coal mining operation. 312 IAC 25-1-137 "Overburden" means material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil. 312 IAC 25-1-137

⁹ Indiana Dam Safety Inspection Manual, 2007, §5.1, p. 1.

¹⁰ *Testimony of Kendra Cohen-Cook*, p. 6 of this report.

¹¹ Petitioners' Exhibit J.

¹² *Testimony of Dean Doti*, p. 7, of this report.

MOVE OVER LAKE DAM
CONSERVANCY ANNUAL O & M BUDGET
2013

1. Lake Treatment	\$10,000.00
2. Dam Mowing	\$3,000.00
3. Trash Rack Cleaning	\$1,000.00
4. Engineering Inspection	\$2,500.00
5. Legal	\$3,000.00
6. Insurance	<u>\$5,000.00</u>
	\$24,500.00

Petitioners' Exhibit I

The recommended budget would increase assessed fees from \$1,500 annually to approximately \$1,633. Dam improvements would help assure stability and integrity as well as help to preserve the recreational values of Move Over Lake.

The Association installed and operated a large diffuser aeration system to improve the water quality and eliminate annual lake turn over and resulting fish kill.¹³ Dean Doti noted that surface water from surrounding farm fields drains into Move Over Lake adding to the nutrient load. Sally Harrison testified that the current chemical treatment is not sufficient to control weeds in the lake. The integration of erosion control measures and use of filtration systems, such as those recommended in Commission's Information Bulletin #71, can improve fish and wildlife habitat and enhance the natural scenic beauty of the landscape.¹⁴ Even though Information Bulletin #71 addresses integration of these environment-enhancing systems in public freshwater lakes, rivers, and streams, the principles would also apply to private lakes, such as Move Over Lake.

The maintenance responsibilities of the Association would be shifted to the proposed Move Over Lake Conservancy District, including dam repair and maintenance, and water quality improvement through ownership, long-term lease agreement, or other legal mechanism. Ind. Code § 14-33-7-1(a)(4) provides that "all the real property in the district..., constitutes a taxing district for the purpose of levying special benefit taxes to pay for...the expenses of putting the district plan into operation by constructing the necessary works. The special tax equals the amount of benefits received; and must be based on return for the benefits. Ind. Code § 14-33-7-1(b) The proposed Move Over Lake Conservancy District may supplement its budget for the maintenance repair and operation of the works of improvements necessary for developing forests, wildlife, parks and recreational facilities in connection with beneficial water management through an annual levy of special benefit taxes, and an annual assessment on land found to be exceptionally benefitted.

The proposed conservancy district as a quasi-governmental entity affords the mechanism for operation, maintenance, and improvements of the Move Over Lake dam including funds management. The proposed conservancy district does not appear to have ownership of all properties needed to affect its purposes. Success of the proposed district is contingent upon acquiring necessary property rights. A conservancy district may, under proper circumstances, exercise power of eminent domain. Ind. Code § 14-33-6-13

¹³ DNR Memorandum, p. 13, of this report.

¹⁴ Information Bulletin #71, *Bioengineered Materials and Techniques for Public Freshwater Lakes, Rivers, and Streams*, (April 1, 2012), 20120404-IR-312120154NRA, p. 1.

Whether the proposed district seems to offer benefits in excess of costs and damages.

The 2004, 2007, and 2010 DNR Dam Safety Inspection Reports indicate the overall status of the Move Over Lake dam as conditionally poor.¹⁵ Dams are commonly used to provide recreational resources and can enhance property values, but they must be properly maintained to realize their potential.¹⁶ Dam failures are usually the result of improper design or construction, or poor maintenance.¹⁷ The dam owner loses a valuable asset and faces reconstruction costs and possible liability for downstream damages.¹⁸

The loss of Move Over Lake would lead to decreased property values and decreased recreational opportunities. The benefits gained from developing recreational facilities in connection with beneficial water management in relation to costs and damages are partly intrinsic in nature and may be partly impossible to quantify. Additionally, the value of a lake to a community is partly subjective. Andrew Faust testified that he would consider breaching the Move Over Lake dam due to financial concerns even though his property would be devalued by more than \$20,000.¹⁹ To summarize, there is a potential at a minimum of \$800,000 loss of property value and recreational opportunity that may be incurred through the loss of Move Over Lake. The costs for improvements of the dam and recreational facilities are estimated at \$312,207.30.

Dam owners should be financially prepared to perform necessary dam inspections, maintenance, and repairs. The benefits of dam improvement and continued maintenance of the dam and other recreational amenities exceeds all consequential costs of dam failure. The proposed district seems to offer benefits in excess of costs and damages.

Whether the proposed district proposes to cover and serve a proper area

Under Ind. Code § 14-33-3-1, any area may be established as a district if each part of the district is contiguous to another part. The description of territory to be included in the Move Over Lake Conservancy District would include Move Over Lake, the dam, and principal and emergency spillways. Testimony was also presented describing the remaining area to be included in the proposed conservancy district as those real properties within Move Over Lake residential development that are “touching or adjacent to the main lake”, and those “freeholds that offer access to the lake”.²⁰ Below is an aerial photograph that shows the real properties to be included in the proposed conservancy district.

¹⁵ DNR Memorandum, p. 15, of this report.

¹⁶ Indiana Dam Safety Inspection Manual, 2007, § 1.1, Figure 1-1, p. 1-1; <http://www.in.gov/dnr/water/3593.htm>.

¹⁷ *Id.*, § 5.1, p. 5.

¹⁸ *Id.*, § 1.4.2, p. 1-5.

¹⁹ *Testimony of Andrew Faust*, p. 5, of this report.

²⁰ *Testimony of Twiggs*, p. 5, of this report.

The area within the proposed district boundaries, and as depicted in the proposed conservancy district boundary map²¹ filed with the Vigo Circuit Court, appears to be contiguous.

Evidence presented by the Petitioners as well as state agency comments filed during this proceeding establish there does not exist, near the proposed district boundaries, a water management or a water supply project with which the Move Over Lake Conservancy District would interfere.

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PURPOSE: Operation, maintenance, and improvement of a work of improvement for water based recreational purposes

The proposed district appears to be necessary

The Move Over Lake community is a residential development located in unincorporated, Vigo County, Indiana, and adjacent to Move Over Lake. Move Over Lake, the dam and spillway are within the residential development. The dam and “appurtenant works”²² span three parcels within the Move Over Lake community owned by Roy and Deloris Woodsmall, Sally Harrison and Sherry Lamb, and Mary Jane Aten Faust. The dam embankment spans the properties owned by the Woodsmalls and Harrison and Lamb. The principal spillway is located on the Faust property. According to testimony and DNR records, the owners of the dam are Roy and Deloris Woodsmall, Sally Harrison and Sherry Lamb, and Mary Jane Aten Faust.²³

The DNR inspected the Move Over Lake dam in 2004, 2007, and 2010. In the 2010 inspection report, the agency concluded the “entire dam needs major rehab”.

Triad Associates conducted an inspection of the Move Over Lake dam and its appurtenances. The Preliminary Engineering Report’s Move Over Dam Field Report, dated August 28, 2011, states the following:

The IDNR Earth Dam Visual Inspection Reports note that the dam is in very poor condition. The dam was reported to have been constructed prior to 1950. There are no plans available for the dam. The 20 foot tall earth for the dam was reported to have been brought to the site from the coal strip mines located in the area. The crest of the dam is over 25 feet wide and 500 feet in length. The private stone roadway, Bunch Road, traverses the top of the dam in a general south-east to north-west direction. A 6 foot by 10 foot poured-in-place concrete box spillway is the principal spillway. There is no emergency spillway. The top of the dam is less than 5 feet above the spillway weir crest. The upstream face of the dam has a slope of 2:1 and is covered with trees and undergrowth. The downstream face of the dam has a slope 2:1 and is also covered with trees and undergrowth. There is no erosion control on the upstream or downstream side of the dam. The discharge side of the principal spillway is severely eroded. The erosion extends back under the concrete box structure. There is heavy tree fall in the outlet stream at the outfall of the principal spillway...The dam crest was topped in 2008 after a heavy rainfall event. The crest was topped in at least two locations as evidenced by the downstream dam face erosion. The two areas are near the northwest end of the dam. There is evidence of a slight settlement of the dam crest at the two locations.

Petitioners’ Exhibit C

On December 2, 2011, the DNR forwarded a letter to the joint dam owners, stating, in part

²² "Appurtenant works" means auxiliary features of a dam that are reasonably required for the safe and proper operation of the structure. The term may include each of the following: (1) The spillway system. (2) Outlet works. (3) Gates and valves. (4) Tunnels. (5) Conduits. (6) Levees. (7) Embankments. 312 IAC 10.5-2-2

²³ Petitioners’ Exhibit C, Department Letter dated December 2, 2011.

The last inspection made on this dam indicated several items of concern. Our State inspector rated the overall condition of the dam of “Poor” and provided recommendations to improve the condition and safety of your dam. The Poor rating for overall condition means that a potential dam safety deficiency are clearly recognized for normal loading conditions, and immediate actions to resolve the deficiency are recommended. Further, reservoir restrictions may be necessary until the problem resolution. ...Only 9.9% of our regulated dams have this bad of a rating.

The Dam Safety Act (I.C. 14-27-7.5) anticipates that the owner of the dam will follow the recommendations given in the dam inspection report.

The inspection report states that growth is too dense for proper inspection, trees, brush and briars are on the upstream and downstream slopes, and trees are in the emergency spillway channel. The report section labeled “ITEMS REQUIRING ACTION BY OWNER TO IMPROVE THE SAFETY OF THE DAM” lists item “(3) Clear trees and or brush from entire dam. Trees larger than 6” in diameter should be removed under the supervision of an engineer.” Other major items of work are also expressed.

Twiggs testified that the Association has been working to resolve the deficiencies of Move Over Lake and dam since 2004. In 2008, the Move Over Lake dam was overtopped during a heavy rain event. Twiggs testified all Move Over Lake homeowners were notified that breaching of the dam and loss of property values may result if the dam is not repaired and brought into compliance with regulatory standards. Phase 1 emergency repairs to the portion of the dam located on the Faust property were completed on November 18, 2011. The Association collected funds from some homeowners to cover costs, but the Association continues to experience resistance in collecting funds for further repair of the dam.

Statements in Remonstrants’ Exhibit 17 reflect the position of Remonstrant freeholders, Sally Harrison, Sherry Lamb, Richard Harrison, Beth D’Amico, Roy and Delores Woodsmall.

When we were presented with the initial idea of dam repair we told Mr. Faust to leave our property to us and we would get it in compliance with the IDNR... At that time Mr. Faust asked other lake property owners for money to help pay for his portion of the repairs. We did not wish to pool our money with other land owners to repair a section of the lake overflow that Mr. Faust owns. We told all of the landowners present at a meeting in January that we would be more than happy to take care of our property and pay for it on our own behalf. ...

The work that was done on Mr. Faust’s Property cleared more trees than necessary on his property and ours, I am sad to say. ...

We can save everyone time and money if we are allowed to just do the work on our own property

According to the DNR’s *Dam Safety Inspection Manual*, dams are complex structures.²⁴ The *Manual* also provides:

²⁴ General Guidelines for New Dams and Improvements to Existing Dams in Indiana, 2001 Edition (with 2010 Appendices) §1.1. <http://www.in.gov/dnr/water/files/wa-damguidelines.pdf>.

Every dam should accomplish the following objectives under all anticipated loading conditions:

- (1) hold back or store water safely
- (2) contain the water and resist leakage
- (3) maintain its shape and configuration
- (4) resist movement in any direction
- (5) safely pass maximum design flood events

....

The spillways and outlets are designed for controlled release of the reservoir water, during sunny day operation and flood events. Spillways are normal, day-to-day release mode; outlets are designed to drawdown the reservoir below the spillway elevation. Outlet works, also called drawdown works or drains, are used for various reasons:

- quickly lower water level if dam failure is an issue
- lower water level for dam repairs or maintenance
- regulate downstream flow
- provide irrigation water
- drive hydro-machinery.

Dam Safety Inspection, pp. 2-1, 2-12, respectively.

An embankment (main part of the dam) cannot safely function as intended without corresponding spillways and outlets. Appropriate maintenance is an integral part of responsible dam ownership.²⁵ Dams require an on-going inspection and maintenance program to insure their continued safety and useful life.²⁶ Where adequate repair and management of a dam are currently being provided, there is no need. But the continuing lack of proper dam maintenance is documented by DNR and Triad Associates inspections reports.

The Association does not have a management structure in place to facilitate the assumption of these maintenance responsibilities. The discord among the community presents a hurdle to accomplishing the required repair and maintenance of Move Over Lake dam and its appurtenances. The proposed district appears to be necessary for the purpose of operation, maintenance and improvement of works of improvement, including Move Over Lake and the Move Over Lake dam and spillways.

Whether the proposed district holds promise of economic and engineering feasibility

Triad Associates recommended a two-phase repair of the Move Over Lake dam and its appurtenances works. To repair Move Over Lake dam and bring the dam into regulatory compliance, the following was completed in Phase 1 with a \$92,987.30 total project cost:

Move Over Lake Dam
Phase 1
Emergency Repairs
November 2011

²⁵ Department Memorandum, p. 13 of this report.

²⁶ Indiana Dam Safety Inspection Manual, §1.1, p. 1-1.

Project clearing was commenced by LandTechwmi [a geo-technical site work and environmental landscaping company] on October 3, 2011. ... Work was completed November 18, 2011.

The work included clearing of the downstream channel, clearing the upstream dam face on the Faust Property, clearing and filling the downstream face of the dam on the Faust Property, downstream channel hard armor, and hard armor of the two erosion areas on the downstream face from the 2008 storm damage. The inlet channel to the principal spillway on the northwest side was cleared of trees.

Petitioners' Exhibit D

In December 2011, Triad Associates and LandTechwmi prepared construction plans and preliminary budget for Phase 2 with an estimated \$219,220²⁷ total project cost:

MOVE OVER LAKE DAM PHASE 2 – CONSTRUCTION

Since [December 2011] further engineering analysis and design has shown that the needed emergency spillway was much larger and more complex than anticipated. The first hydraulic analysis performed showed that the proposed emergency spillway needed to accommodate substantially more water than originally anticipated.

The proposed emergency spillway consists of a low profile rectangular weir followed by twin 10 foot by 10 foot precast concrete box structures to allow the water to flow under the roadway adjacent to the principal spillway. Upstream and downstream channel erosion control (armoring) has also been included as part of the design. ...

The other items included in Phase 2 construction include the following:

- Upstream and downstream dam face clearing as recommended by the engineer and IDNR.
- Downstream dam face fill to provide a mowable and maintainable slope.
- Upstream dam face hard armoring (rip-rap) as recommended by the engineer and the IDNR. This will reduce erosion and limit geese and rodent habitat.
- Adjust top of dam road to fill low spots.
- Further engineering including additional hydraulic analysis, design, dam topographic survey, O & M Manual, and Permit Application. ...

Petitioners' Exhibit E

Evidence presented indicates that the loss of Move Over Lake would decrease property values in the residential community in a range of \$800,000 to \$1 million. The total estimated costs for the two-phase Move Over Lake dam repair project is \$312,207.30. Schubert testified that based on his experience, investigation, and study of Move Over Lake dam and spillway, the proposed conservancy district holds promise of economic and engineering feasibility.²⁸

²⁷ Petitioners' Exhibit H.

²⁸ *Testimony of Schubert*, p. 6, of this report.

Twiggs testified that if the proposed conservancy district is established, the conservancy district would obtain short-term financing for the dam repair project from a Vigo County, Indiana financial institution. Once the repairs are completed the proposed conservancy district would assess the freeholders to cover the capital costs of the project, and seek long-term financing through a bond issue or other method available to conservancy districts. The long-term financing would be paid over the life of the bond through freeholder assessments. Ind. Code § 14-33-14-4 requires the proposed Move Over Lake Conservancy district to also establish a cumulative maintenance fund so that the Move Over Lake dam is adequately maintained.

Twiggs testified that the proposed conservancy district would obtain ownership of the Move Over Lake common area, ownership or leasehold interest in the dam, and ownership of the dam spillways in order to complete the remaining dam repairs and continued management of the structure. Andrew Faust testified that he would convey his ownership of the dam to the proposed conservancy district. Twiggs testified that the Association offered verbally, and subsequently, a written offer to purchase or obtain a leasehold interest from the remaining owners of the dam—Woodsmalls, Harrison and Lamb. As of the date of this report, an agreement has not been reached. In order for the repair and maintenance of the dam at Move Over Lake to be successful, one entity needs to be responsible party through ownership or long-term lease.²⁹ A contractual lease agreement, if successful, between the proposed conservancy district and all owners of the dam would facilitate the repair of Move Over Lake dam and its appurtenant works.

A dam safety inspection performed on a regular basis is one of the most economical means a dam owner can use to assure the safety and long life of a dam and its immediate environment.³⁰ The use of a conservancy district is a proven mechanism for managing the operation, maintenance, and improvement of lakes and dams. The proposed conservancy district does not appear to have ownership of all properties needed to affect its purposes. Success of the proposed district is contingent upon acquiring necessary property rights. A conservancy district may, under proper circumstances, exercise power of eminent domain. Ind. Code § 14-33-6-13

Whether the proposed district seems to offer benefits in excess of costs and damages

The storage of water is a hazardous activity; it creates increased risk to lives and property situated downstream of the dam.³¹ Under Ind. Code §14-27-7, an owner is required to keep their dam in a state of repair and operating condition through the exercise of prudence, due regard for life or property, and the application of sound and accepted engineering principles.

The estimated cost to bring Move Over Lake dam into regulatory compliance and to rectify the progressive deterioration is approximately \$312,207.30, of which \$92,987.30 funded completion of Phase 1 emergency repairs. The remaining portion of the dam, a little over two-thirds, continues to be deficient. Each of the 15 freeholds within the proposed district would be assessed \$20,000 to cover the remaining estimated dam improvement costs. The estimated annual

²⁹ DNR Memorandum, p. 16, of this report.

³⁰ Indiana Dam Safety Inspection Manual, §2.1, p. 2-3.

³¹ General Guidelines for New Dams and Improvements to Existing Dams in Indiana, 2001 Edition (with 2010 Appendices) §1, p. 1.1. <http://www.in.gov/dnr/water/files/wa-damguidelines.pdf>.

operating and management budget for the proposed conservancy district is approximately \$24,500, resulting in an annual assessment per freehold of \$1,633.

“A good safety inspection and maintenance program is also important to the owner’s bottom line. The typical dam represents a considerable cash investment. Loss of the dam could result in the loss of a water source, recreational facility, flood protection, or other assets.”³² At the January 11 public hearing, Andrew Faust testified that his property would be devalued by more than \$20,000 with the loss of Move Over Lake. Testimony indicates that there would be a total estimated economic impact to the Move Over Lake community in a range of \$800,000 to \$1 million with the loss of Move Over Lake. The benefits to costs ratio, based solely on the project costs are approximately 3:1. With the improvements, the recreational value of Move Over Lake will be preserved, and will also assure stability of Bunch Road that traverses the top of the dam providing continued access to the Move Over Lake area. Schubert agreed with testimony indicating the community would experience a significant economic loss with the loss of the recreation component.³³

The Association has annually assessed homeowners to cover costs associated with chemical treatment to control aquatic weeds and algae, but Twiggs testified that the Association “has not done much maintenance or repair on the dam itself”. Sally Harrison testified, “We have put thousands and thousands of dollars in the dam”. In Remonstrants’ Exhibit 17, the Remonstrants state “...for the past 9 years we have paid for the rock on our portion of the road, cleaned snow off of the road, cleared [trees] that fall across the road ([whether]) or not they are on our property”. The application of trial-and-error “home remedies” to dam problems is not recommended and such an approach may prove to be far more costly than obtaining and acting on professional advice.³⁴ The Department and Triad Associates have inspected the Move Over Lake dam and have made recommendations for its repair and maintenance. Compliance with government or professional standards does not absolve an owner from liability, but it does establish a minimum standard of care to be used by owners.³⁵

The Petition indicates that the costs and damages for reconstruction, repair, maintenance and improvement of the Move Over Lake dam and spillway will be paid solely by the proposed conservancy district. The Indiana General Assembly enacted the Conservancy District Act codified at Ind. Code § 14-33. By statute, a conservancy district may levy special benefit taxes to cover: (1) expenses of establishing the district; (2) general preliminary and administrative expenses; (3) expenses of preparing the district plan; (4) expenses of putting the district plan into operation by constructing the necessary works; and (5) expenses of operating and maintaining the district. Ind. Code § IC 14-33-7-1 A conservancy district may also pay its expenses and obligations from the collection of assessments from land that receives exceptional benefits from the operation of the district plan and the collection of assessments for maintenance and operation of the works of improvement. Ind. Code § 14-33-7-5(4).

³² *Id.* at § 1.1, p. 1-1.

³³ *Testimony of Schubert*, p. 6, of this report.

³⁴ Indiana Dam Safety Inspection Manual, § 1.2, p. 1-2

³⁵ *Id.*, § 1.4.2, p. 1-5.

Some lots within the Move Over Lake residential community remain undeveloped. Petitioners' Exhibits B and J list the assessed values of the properties within the lake community, as obtained from the Vigo County Beacon³⁶, ranging from \$1,248 to \$274,400. Twiggs testified that each of the 15 freeholders would be assessed approximately \$20,000 to cover total costs of the dam repair (\$312,207.30). Whether the assessment to a parcel should be proportionate to valuation of the parcel is within the province of the Vigo County Circuit Court.

The owner of a dam is responsible for operating and maintaining the dam in a safe manner. It would be prudent for the Association, or subsequently, the Move Over Lake Conservancy District if created, to develop a dam safety program that includes safety inspections, and an operation and maintenance plan.³⁷ The benefits associated with bringing an unsafe dam up to current dam safety standards, providing maintenance, and continuing to provide recreational opportunities to secure the economic viability of the local community that depends on the lake, should exceed the costs.

Whether the proposed district proposes to cover and serve a proper area

The December 6, 2012 Vigo Circuit Court "Entry Ordering the Petition Referred to the Natural Resources Commission" states

Freeholder Harrison orally objects to the establishment of the proposed district on the grounds that the proposed district does not contain all landowners who may be affected by the project. The Court finds that the purpose of this hearing does not contemplate the adjudication of such an issue and therefore declines to address the issue.

At the January 11, 2013 public hearing, Sally Harrison did not renew this concern nor did she provide evidence upon which the Commission could make recommendations to add landowners.

Any area may be established as a district if each part of the district is contiguous to another part. The territory to be included in the Move Over Lake Conservancy District appears to be contiguous. The area within the proposed district boundary appears to be contiguous.

Whether the proposed district could be established and operated in a manner compatible with established: conservancy districts; flood control projects; reservoirs; lakes; drains; levees; and other water management or water supply projects

Evidence presented by the Petitioners as well as state agency comments filed during this proceeding establish there does not exist, near the proposed district boundaries, a water management or a water supply project with which the Move Over Lake Conservancy District would interfere.

³⁶ Beacon™ is an interactive public access tool that allows users to view County and City information, public records and Geographic Information Systems (GIS) via an online portal.

<http://beacon.schneidercorp.com/?site=VigoCountyIN>

³⁷ Indiana Dam Safety Inspection Manual, § 1.2, p. 1-2.

III. RECOMMENDATION

It is recommended that the Natural Resources Commission adopt the foregoing report as its report to the Vigo Circuit Court.

Dated: February 27, 2013

Jennifer M. Kane, Hearing Officer
Natural Resources Commission

A copy of the foregoing was sent to the following:

Alan M. Hux
Taft Stettinius & Hollister LLP
One Indiana Square, Suite 3500
Indianapolis IN 46204-2023
(Sent via ahux@taftlaw.com)

Cc: Terri Price, DNR (tprice@dnr.in.gov)
Beth D'Amico (madem13@aol.com)
Andrew Faust (faust6475@comcast.net)
Sally Harrison (sallyharrisonconcrete@gmail.com)
Jim Twiggs (coastali@bellsouth.net)
Thomas Schubert (tschubert@triadassoc.net)